



Steven L. Beshear
Governor

Leonard K. Peters
Secretary
Energy and Environment Cabinet

Commonwealth of Kentucky
Public Service Commission
211 Sower Blvd.
P.O. Box 615
Frankfort, Kentucky 40602-0615
Telephone: (502) 564-3940
Fax: (502) 564-3460
psc.ky.gov

David L. Armstrong
Chairman

James W. Gardner
Vice Chairman

Linda K. Breathitt
Commissioner

November 13, 2014

PSC STAFF OPINION 2014-015

W. Brent Rice
McBrayer Attorneys at Law
201 East Main Street, Suite 900
Lexington KY 40507

Re: Tower Access Group request for Advisory Opinion regarding Commission jurisdiction over construction of wireless cellular tower on Eastern Kentucky University property

Dear Mr. Rice:

Commission Staff acknowledges receipt of your October 23, 2014 letter in which you request an opinion whether the Commission has jurisdiction over the construction of a proposed cellular tower to be located on the campus of Eastern Kentucky University ("EKU") in Richmond, Kentucky. This letter represents Commission Staff's interpretation of the law as applied to the facts presented. This opinion is advisory in nature and not binding on the Commission should the issues herein be formally presented for Commission resolution.

Based upon your letter, Commission Staff understands the facts as follows: Your client, Tower Access Group, LLC ("TAG"), was the winning bidder for the construction and operation of a communication tower to be utilized by wireless carriers. ("wireless cellular tower") to be located on EKU property, in Richmond, Kentucky. The Richmond Planning and Zoning Commission ("Richmond Planning Commission") has adopted planning and zoning regulations, which include the construction of wireless cellular towers, for land use within the corporate limits of Richmond, Kentucky. The Richmond Planning Commission advised TAG that the proposed tower was exempt from its jurisdiction because the proposed tower will be located on EKU property, which is exempt from local zoning regulations.

Pursuant to KRS 278.650 and 278.665, the Commission has jurisdiction to issue a certificate of public convenience and necessity ("CPCN") for the construction of a wireless cellular tower located in an area outside the jurisdiction of a planning commission. Pursuant to KRS 100.987, local planning units, but not the Commission,

have jurisdiction over towers built within the political boundary of a local planning commission that has adopted planning and zoning regulations. If the local planning unit has adopted planning and zoning regulations, the jurisdiction over wireless cellular towers within the planning unit's boundary rests with the planning unit, and not the Commission.¹

However, pursuant to KRS 100.361(2), any property owned by the Commonwealth of Kentucky or its political subdivisions is exempt from the authority of local planning units. KRS 100.361(2) states:

Nothing in this chapter shall impair the sovereignty of the Commonwealth of Kentucky over its political subdivisions. Any proposal affecting land use by any department, commission, board, authority, agency, or instrumentality of state government shall not require approval of the local planning unit....

Thus, the construction of a wireless cellular tower on property owned by the Commonwealth is, by law, not within the boundary of a local planning unit.²

Pursuant to KRS 164.001, ECU is a public postsecondary education institution operated by the Commonwealth of Kentucky. Actual ownership of property acquired by a postsecondary education institution is vested "in the name of the Commonwealth for the use and benefit of the institution."³ Therefore, the title to property owned by ECU is vested in the Commonwealth of Kentucky.

KRS 100.361(2) exempts state-owned property from local planning unit regulations. Therefore, when a proposed tower will be physically located on property whose title is vested in the Commonwealth, it follows that the proposed tower will be constructed outside the political boundary of a local planning unit.⁴ Thus, pursuant to KRS 278.650, the Commission has jurisdiction over the construction of a proposed wireless cellular tower physically located on property whose title is vested in the Commonwealth, and a CPCN application must be filed and prior Commission approval granted before construction begins.⁵

This letter represents Commission Staff's interpretation of the law as applied to the facts presented. This opinion is advisory in nature and is not binding on the Commission should the issues herein be formally presented for Commission resolution. Questions

¹ Public Service Comm'n v. Shadoan, 325 S.W.3d 360, 365 (Ky. 2010).

² Case No. 2009-00034, *In the matter of Application of New Cingular Wireless PSC, LLC for Issuance of a Certificate of Public Convenience and Necessity to Construct a Wireless Communications Facility at 1707 Second Street, Henderson, Henderson County, Kentucky 42420* (Order March 22, 2010; Final Order April 1, 2010).

³ KRS 164.410(3).

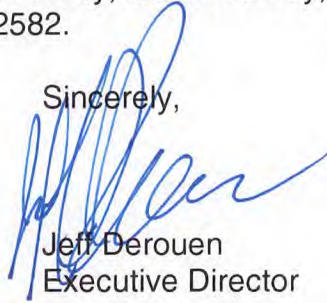
⁴ Case No. 2009-00034, (Order March 22, 2010; Final Order April 1, 2010).

⁵ *Id.*

Mr. Rice
November 13, 2014
Page 3

concerning this opinion should be directed to J.E.B. Pinney, Staff Attorney, at (502) 782-2587 or Nancy Vinsel, Staff Attorney, at (502) 782-2582.

Sincerely,



Jeff Derouen
Executive Director

NV/kg